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UNCLAS SECTION 01 OF 03 WELLINGTON 000154

SIPDIS

SENSITIVE

STATE FOR EB/IPE-SWILSON AND EAP/ANP-TRAMSEY
STATE PLEASE PASS TO USTR FOR JCHOE-GROVES AND DKATZ
STATE PLEASE PASS TO USPTO FOR JURBAN
STATE PLEASE PASS TO LOC FOR STEPP
COMMERCE FOR JBOGER AND GPAINE/4530/ITA/MAC/AP/OSAO

E.O. 12958: N/A

TAGS: [KIPR](#) [ETRD](#) [ECON](#) [PREL](#) [NZ](#)

SUBJECT: YEAR 2005 SPECIAL 301 REVIEW -- NEW ZEALAND

REF: A. STATE 23950

[1](#)B. 04 WELLINGTON 1037

[1](#)C. 04 WELLINGTON 900

[1](#)D. 04 WELLINGTON 516

Sensitive but Unclassified -- for U.S. government channels only.

Summary

[1](#)1. (SBU) Although both the pharmaceutical and music-recording industries urge that New Zealand be placed on the Special 301 List, the Embassy recommends that New Zealand not be listed. The country's overall record is well above that of countries typically on the 301 list. As in past years, the Embassy continues to believe that the pharmaceutical industry's restricted access to New Zealand's market stems more from the government's anti-competitive drug-purchasing policy than a failure to protect intellectual property. While the music industry has legitimate concerns about New Zealand's proposed exceptions to copyright protection, the government is discussing those exceptions with industry and will likely change them.

IPR in general

[1](#)2. (SBU) The New Zealand government in general provides adequate and effective protection of intellectual property rights (IPR). While no IPR-related legislation was introduced in 2004, the government's actions in 2003 showed it to be strengthening its IP regime: banning the parallel importation of films, videos and DVDs; making trademark infringements a criminal offense; and increasing the penalties for copyright infringements. With few exceptions, the government has not rolled back its advances in IP protection.

The pharmaceutical issue

[1](#)3. (SBU) The pharmaceutical industry has a number of legitimate complaints about its treatment in the New Zealand market, and we are continuing to press for an improvement in this situation. However, the barriers to pharmaceuticals are primarily caused by the process in which the Pharmaceutical Management Agency (PHARMAC), a stand-alone Crown entity, decides which medicines will be subsidized by the New Zealand government and what their prices will be. The issue also is one of funding, since a larger budget would allow PHARMAC -- which has operated for the last 10 years with minimal increases in its annual budget -- to put more medicines, and perhaps more cutting-edge medicines, on its pharmaceutical list. (ref B)

[1](#)4. (SBU) The Embassy believes this market-access barrier should be dealt with as such and not treated as a failure to protect intellectual property. Even the Researched Medicines Industry Association of New Zealand concedes that PHARMAC's practices do not violate the government's TRIPS commitments. The government also has mostly defined the issue as a matter of ensuring affordable pharmaceutical prices for all New Zealanders. Listing the country on the Watch List would only enable the government to claim to the New Zealand public that its policies protect the population against a greedy pharmaceutical industry.

[1](#)5. (U) Curiously, the pharmaceutical industry in its Special 301 submission did not mention concern over the government's proposed revision of the Patents Act. The draft bill fails to meet two of the industry's objectives in New Zealand: (1) It does not allow patent protection for diagnostic, therapeutic and surgical methods for the treatment of humans, as allowed under the TRIPS agreement, and (2) it fails to extend the effective patent life of drugs. The effective patent life (the period after marketing approval is obtained during which companies are earning a return on their patented product) stands at seven years on average in New Zealand. Moreover, the revision leaves in place an amendment that

provides an exception to Patents Act protection, allowing generic competitors to begin the process required for regulatory approval of a product while a proprietary drug is still under patent. (ref C) While we may in the future want to place New Zealand on the Watch List because of this legislation, we believe the precedent of listing a country because of its draft legislation would not be a good one for the United States and could minimize our negotiating effort on the bill. We continue to press New Zealand government officials about the draft bill and recommend that U.S. government officials raise this issue with their New Zealand government counterparts.

Format- and time-shifting

16. (U) The New Zealand government has proposed amendments to the Copyright Act 1994 that would allow format-shifting, or the duplication of sound recordings to another format for a purchaser's private use without the copyright owner's permission. The amendments also would extend to all communication works a provision in the Copyright Act that permits time-shifting, or the recording of a broadcast or cable program for private use solely for the purpose of viewing or listening to the recording at a more convenient time or for making a complaint. The amendments were proposed and released as a cabinet paper in June 2003, after a review of how digital technology had affected the country's copyright law (see Paragraph 13). Legislation incorporating the amendments is being drafted and is expected to be introduced in Parliament in April. (ref D)

17. (SBU) As the International Intellectual Property Alliance noted in its Special 301 submission, these exceptions to copyright protection would send the wrong message to consumers and undermine efforts to curb unauthorized copying of CDs in New Zealand. They would cost the industry in revenue and profits and discourage innovation. However, Associate Minister of Commerce Judith Tizard still is discussing the issue with the music industry and has expressed a desire for a solution that satisfies all parties, although the format-shifting and time-shifting exceptions remain for now as proposed in the cabinet paper. We will continue to work with the government and industry on this issue. In the meantime, with discussions ongoing, we believe a Special 301 listing over this issue would not be helpful.

Optical media piracy

18. (U) While New Zealand does not have any regulations specifically addressing optical media manufacturing, the Copyright Act 1994 -- including protections and sanctions for copyright infringement -- applies to optical media. We are not aware of significant problems with optical media piracy in New Zealand.

Procurement/use of government software

19. (U) New Zealand has no specific guidelines relating to government use or procurement of software, but it does have general rules pertaining to protection of intellectual property in the public sector.

TRIPS compliance

10. (U) Following a government review of the Patents Act 1953 that began in August 2000, the Ministry of Economic Development has drafted legislation intended to bring the act into closer conformity with international standards. The draft would keep the maximum patent term at 20 years, but would tighten the criteria for granting a patent, from a patentable invention being new in New Zealand, to being new anywhere in the world, involving an inventive step and being useful. The bill is expected to be introduced in Parliament by mid-2005.

11. (U) No new IPR-related legislation was introduced or went into force in 2004.

12. (U) We are unaware of any new legislation related specifically to domestic protection of traditional knowledge or expressions of folklore. However, the proposed changes to the Patents Act 1953 include a provision to set up a Maori consultative committee that would advise the patents commissioner on whether a patent application pertains to an invention that is derived from Maori traditional knowledge, indigenous plants or animals and whether the commercial exploitation of such an invention would be contrary to Maori values.

WCT/ WPPT

13. (U) The government in June 2003 proposed amendments to the Copyright Act 1994 to make it more consistent with the World Intellectual Property Organization Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT). The amendments are intended to ensure that the act reflects

developments in digital technologies and international developments in copyright. Legislation containing these amendments is expected to be introduced in April 2005. If it is passed, the government would decide whether to accede to the WCT and WPPT.

Enforcement

14. (U) The New Zealand government is committed to adequately and effectively enforcing its IPR-related laws, as reflected by the creation of new criminal offenses for trademark infringements and the increases in penalties for copyright infringements.
Swindells